Sovereignty and Validity

Sovereignty and Validity: On the Relation Between the Concepts and the Role of Acceptance

Antonia Waltermann

Abstract Austin defined law as the commands of a sovereign. This paper investigates the relation between the concept of sovereignty and legal validity, departing from Austin's jurisprudence by distinguishing between constitutive and constituted sovereignty. The aim of this paper is not to prescribe one particular understanding of law, sovereignty, or validity. Rather, it is to investigate what implications one particular understanding of sovereignty has for our understanding of law and validity. Accordingly, this paper posits that a focus on popular sovereignty, which is constitutive, does not cohere well with certain understandings of legal validity, namely validity from pedigree and validity from reason. The understanding of validity that fits best with a focus on popular sovereignty is from acceptance, and a further distinction can be made in this regard with acceptance of an institutional system of law and acceptance of individual rules.

1 Introduction

John Austin famously described law as the commands of a sovereign (Austin 1869). This definition of "law" has been criticized by Hart (2012) as making no distinction between law and the commands of a gunman. Hart's criticism is convincing, but Austin's understanding of law is nevertheless interesting to consider in light of two observations. The first is that Austin's understanding of law necessarily connects the nature of law with the existence of a sovereign; the second is that on a particular understanding of the term "validity," it also connects validity, sovereignty, and law. Carpentier distinguishes between *validity as conformity* and *validity as membership* in his contribution. If laws are the commands of a sovereign, and validity tells us whether a norm belongs to (is a member of) a particular system of norms, the test whether something is a valid legal norm becomes whether this norm is a command of the sovereign. Austin's theory, influential and important though it has been, is

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outdated. While we will nevertheless use it as the starting point for an inquiry into the relationship between the notions of validity and sovereignty, we will do so in a way that incorporates Hart's criticism. With this in mind, the theory that provides the starting point for the present paper should more accurately be described as Austin's theory improved by Hart's or as an amalgam of the two. In particular, we will use Hart's understanding of law in conjunction with the notion of popular sovereignty to investigate the link between sovereignty and validity, given that the notion of popular sovereignty has become increasingly significant and cannot be neglected in an inquiry into the relationship between validity and sovereignty or law and sovereignty. Accordingly, the specific question we will consider in the following is what implications a focus on popular sovereignty has for our understanding of validity. In order to answer this question, we will first consider the notion of sovereignty, both as understood by Austin himself and with improvements on the basis of Hart's theory, focusing on popular sovereignty. Thereafter, we will look at the notion of validity and distinguish three tests for validity found in legal theory. We will consequently determine how each of these tests for validity fits with the notion of popular sovereignty as developed in Sect. 2 of this paper.

It bears mentioning that it is not the aim of this paper to prescribe a particular understanding of law, sovereignty, or validity. This means that the present contribution does not make claims incompatible with critical contributions to this volume, such as von der Pfordten's claim that validity is a mere summary concept, or with more substantive views of validity, such as those put forward by Carpentier. Rather than prescribe or argue for one particular understanding, its aim is to investigate what implications and consequences one particular understanding of sovereignty has for our understanding of law and validity. This does not deny that someone might reject this understanding of sovereignty and hence its implications, nor does it deny that other concepts of sovereignty—for example, in international law—exist. The conclusion of this paper will merely be that one cannot consistently advocate one understanding of popular sovereignty specifically while at the same time rejecting its implications.

The value of this contribution lies not in a reconsideration of validity but rather in connecting existing notions of validity to the notion of popular sovereignty to determine which understanding of validity best coheres with an emphasis on popular sovereignty. Such an emphasis on popular sovereignty is made, for example, in Article 3 of the Portuguese Constitution, Article 1(2) of the Greek Constitution, or Article 3 of the Russian Constitution, all providing that sovereignty belongs to the respective people(s) of those states. This contribution helps us determine which understanding of validity any of these states hold or should hold in order to be consistent with their own constitutions.

2 Sovereignty

The term "sovereignty" appears in many different contexts—think, for example, of constitutional law and international law—and is not always used in the same way or to mean the same thing.[1] In the following, we first examine Austin's understanding of sovereignty and afterward improve it by combining Hart's theory of the rule of recognition with the notion of popular sovereignty.

John Austin described law as the commands of a sovereign—but what is the Austinian sovereign like? A first point to notice is that Austin considered sovereignty to be a matter of (political) fact (Swiffen 2011). This makes determining the sovereign in a given (political) community a matter of empirical investigation, just as one can determine what is law and what is not by means of empirical investigation according to the Austinian theory (Bix 2015). The Austinian sovereign is "defined as a person (or determinate body of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution" (Bix 2015). Hart (2012) criticized Austin's command theory as making no distinction between the state and a gunman robbing a bank. To avoid this criticism, we can instead connect sovereignty to the acceptance of rules, particularly rules regarding the creation of other rules (Swiffen 2011, pp. 72 f.). This means defining sovereignty either in the sense of the power to accept or in the sense of power that is accepted—or in other words, it means we must make a distinction between constitutive sovereignty and constituted sovereignty.

As such, it is possible to combine Austin's command theory of law with an institutional system of law, which is in turn constituted by a people by means of popular sovereignty. Popular sovereignty, in this sense, is *pouvoir constituant*, the extralegal power to constitute, maintain, and deconstruct a legal order (Waltermann 2016), which explains how and in what way "all state power emanates from the people." Popular sovereignty constructs the convention that is the basis for the constituted system of law. Within this system of law, it is still the "commands" of a constituted sovereign (for example, parliament acting in accordance with a certain procedure) that determines what law is.[2] As such, both sovereignty and law remain determinable by empirical inquiry. This picture allows for two kinds of sovereignty: on the one hand, there is popular sovereignty as the power to accept, which constitutes the institutional system. On the other hand, there is the body or institution that creates "commands" and thus corresponds to the Austinian sovereign but that is constituted by the people (power that is accepted).

[1] For only a few examples of the many different ways in which "sovereignty" is used, cf. Besson (2011), Dicey (1915), Goldsworthy (1999), Troper (2012), and Steinberg (2004).

[2] "Commands" here refers not only to rules which regulate conduct and have sanctions attached to them (what Hart would call "primary rules"), but also to rules which regulate the operation and creation of primary rules (what Hart would call "secondary rules"). This is, of course, a departure from Austin's theory.

When it comes to popular sovereignty, we can distinguish between three aspects of it: firstly, in moments of a legal vacuum or outside of the framework of an existing legal system, it is the power to constitute a new legal order by recognising or accepting the rule of recognition of the system in question. Recognition or acceptance should be understood to mean that the people take an internal point of view toward the rules created by the Austinian, constituted sovereign. Hampton (1997, pp. 97 f.) summarizes this as "a convention to regard the norms created by the governing institution(s) as preemptive and final" and calls it the governing convention. Each time an individual follows a rule created by the Austinian sovereign *because* it is a rule by the Austinian sovereign, this instantiates this governing convention and counts as recognition or acceptance of the rule of recognition. Secondly, and in much the same vein, popular sovereignty covers the maintenance of an existing legal order by means of recognition. Thirdly, it is the power to deconstruct an existing legal order by no longer recognising the governing convention or rule of recognition of this legal system. Sufficient instantiation of the governing convention or rule of recognition is therefore a necessary condition for the (continued) existence of a legal system. However, it bears mentioning that because generally legal systems provide for enforcement mechanisms and because instances of rule enforcement count as instantiations of the governing convention as well, deconstructing an existing legal order by no longer recognising the governing convention and rule of recognition may mean an act of revolution.

The governing convention or rule of recognition tells us which norms are valid norms of the legal system. Two conditions need to be fulfilled for such a convention/rule to exist: *efficacy* and *acceptance* (Hart 2012). Efficacy is the requirement that the convention is by and large observed, that is, that the system based on it is by and large efficacious, be it due to effective enforcement mechanisms, due to the cooperative attitude of individuals, or for any other reason. Mere efficacy is not sufficient, however, to distinguish a normative system from pure habit or coercion: the convention also needs to be accepted, or recognized.[3] In other words, sufficiently many individuals must take a particular social attitude toward the convention and thereby toward the system it constitutes. Of course, acceptance of the system will, in all likelihood, also have an impact on the efficacy of the system. It bears mentioning that this understanding of efficacy and acceptance and their relationship differs from the understanding put forward by Hage in his contribution to the present volume. While Hage defines efficacy in terms of acceptance—a rule is efficacious if its consequences are accepted—my understanding of efficacy involves only that the consequences come into being for whatever reason, with acceptance as one possible reason.

It is important to note that it is not individuals as such wielding the power of constitutive sovereignty but rather a people as a collective entity. One individual

[3]The term recognized is used here to emphasise that the social attitude required of people is not a particularly demanding one, in that instantiations of the governing convention do not at all times need to be deliberate acts of instantiation. Individuals may do so unthinkingly.

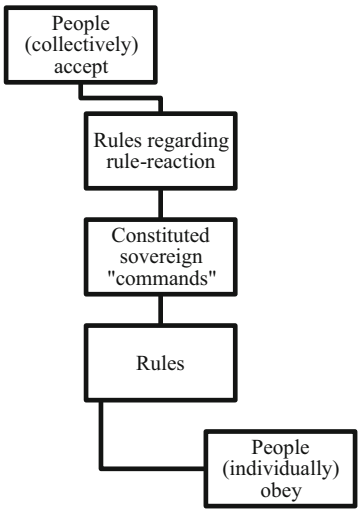

Fig. 1 Popular sovereignty and habitual obedience

cannot, *individually*, exercise constitutive sovereignty. Collectively, however, this is possible. What is necessary is that there is a governing convention or rule of recognition that is

> [...] constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called "acceptance" (Hart 2012, p. 255).

If we combine the elements of popular sovereignty thus defined, an institutional system of law, and a quasi-Austinian constituted sovereign in the form of a body or institution, the commands of which—that is, the rules created by it—receive habitual obedience from the bulk of the population, we get the following Fig. 1:

How does this understanding of sovereignty—or rather of *sovereignties*, as there are two different meanings of it used here—connect to the notion of validity? We will explore this in the next section, distinguishing between three different tests of validity and relating each of them back to an understanding of law and sovereignty, which emphasizes popular sovereignty.

3 Validity

The notion of validity is closely linked to the notion of law. As such, any definition of legal validity that wishes to be conceptually solid immediately requires the answer to a number of questions, and in some ways, simple definitions will appear circular upon close inspection. In particular, the terms "validity" and "law" are closely interlinked. This becomes clear when we ask ourselves whether there can be invalid law. Is an invalid law still law, or is it simply not law at all? To make matters more complicated, the term "validity" has been used in different contexts, meaning

different things. Munzer (1972), for example, identifies that "validity" has been understood to mean—inter alia—that a norm is "felt to be socially binding" by Ross, implying an "ought" by Kelsen, or that it "satisfies all the criteria provided by the rule of recognition" (Hart). This lack of a clear definition of validity is by no means an easy obstacle to overcome. In some languages, however, the terminological ambivalence of "validity" is less acute: German, for example, distinguishes between *Geltung* and *Gültigkeit*, both of which translate to validity. Lumer (1999) defines legal validity in the sense of *Geltung* as legal force (*Rechtskraft*) or institutional recognition of laws, and legal validity in the sense of *Gültigkeit* as the legal force (to generate consequences) of, e.g., passports, testaments but also statutes and regulations. In Danish, Ross (1999) identifies a similar distinction between *gyldig* (which corresponds to *gültig* or *Gültigkeit*) and *gældend* (which corresponds to *geltend* or *Geltung*) but distinguishes between not two but three different meanings of the English "validity": firstly, as a term used in legal doctrine to indicate that a legal act has the desired effect; secondly, as a term used in legal theory to indicate the existence of a norm or a system of norms; and, thirdly, as a norm that gives rise to a corresponding (moral) obligation.

We will, in this contribution, focus in particular on validity as *Geltung*. Accordingly, if something is valid, it is law. This leaves us to consider a number of tests of validity that help determine whether something is or is not law and how these tests cohere with a (strong) focus on popular sovereignty. This focus on legal validity necessarily limits this paper in scope in the following way: it excludes discussions resulting from the assumption that validity implies a duty to obey the law, that is, that it implies binding force. Ross considers this to be a conflict regarding the term "validity" and its meaning(s).[4] Without denying this claim, it can also be posited as a conflict about the meaning of "law." The question whether "validity" implies "binding force" can be turned into the question whether "law" implies "binding force," that is, whether all law is binding and what that means. Under the assumption that validity is taken to mean legal validity, and as such separates law from nonlaw, there can be no invalid law, but it may well be possible that there is law that is not felt to have or does not have binding force. Under the assumption that "validity" necessarily implies "binding force," it may well be possible that there is invalid law, namely that which is not binding.[5]

In this paper, as mentioned, validity will be taken as *Geltung*, which means that any of the tests for validity identified in the following will be tests to separate law

[4]Hill, meanwhile, holds that natural law analyses and positivist analyses agree on the fact that legal validity entails binding force; a point which Ross contests (Hill 1970; Ross 1999).

[5]Given that this paper will take validity as membership, the question as to what precisely it means for a norm to have binding force is outside the scope of this paper. The above explanation why the question of binding force is not of immediate concern to the inquiry of this paper shall have to suffice, here. It is worth pointing out, however, that this use of "binding force" as possibly implying a duty to obey the law differs from Hage's technical definition of "binding force" in his contribution to this volume. Hage's technical definition of "binding force" closely corresponds to my use of "legal validity."

from nonlaw. This means also that all laws are *by definition* valid and all nonlaw invalid. This explains why the tests for validity we will consider in the following are so closely linked to theoretical schools concerning the nature of law.

3.1 Validity from Pedigree

The test of validity from pedigree can be linked to the doctrine of hard positivism. This means that the test is a formal one, looking at the origin of a rule rather than its content. Those rules, and only those rules, that were created according to a particular procedure by a person or body with the legal power to do so are valid, meaning only those rules that have this pedigree are legal rules. This corresponds to Austin's understanding of law as something that can be identified by means of empirical investigation—the investigation, in the Austinian case, needs to consider if the rule in question is a command of the sovereign. It equally corresponds to Hart's understanding of law[6] and in fact to the understanding of legal positivists, especially those we can classify as "hard" or "exclusive" positivists. Marmor (2001, p. 49) summarizes this position as follows:

> Legal validity is exhausted by reference to the conventional sources of law: all law is source based, and anything which is not source based is not law.

Importantly, this means that moral or otherwise evaluative standards do not and *cannot* determine what the law is (Marmor 2006). As such, "a norm is never rendered legally valid in virtue of its moral content" (Marmor 2001, p. 50). If legal validity is not and cannot be determined by the moral content of the norm, what determines it? The answer from exclusive positivism is that the source determines legal validity. This means that legal validity is dependent on and determined by the pedigree of a rule: if the rule was created in accordance with the right procedure by an institution or body with the competence to do so, the rule is legally valid.[7] If this is not the case, it is not legally valid (Waluchow 2009; Dworkin 1968). The former is what we will call the pedigree thesis, the latter a claim to exclusivity, that is, the demand that exclusively those rules that satisfy the test from pedigree are legally valid and therefore law. These two elements combined comprehensively describe the test of validity from pedigree.

[6]Unless we take the postscript of *The Concept of Law* into account, in which case this point is very much debatable.

[7]Hage, in his contribution, distinguishes between source-validity and validity in the sense of a rule existing and generating legal consequences, the latter is what I call legal validity. The test of validity from pedigree makes source-validity the sole requirement of legal validity. Kirste, in his contribution, equates validity from pedigree as I define it here with legal validity in general, if one assumes that legally established criteria for the enactment of a norm refer exclusively to pedigree. This assumption, however, need not be the case: legally established criteria for the enactment of a norm could, in theory, involve criteria other than or in addition to pedigree.

The test of validity from pedigree is familiar to legal scholars, particularly those with an interest in legal theory. It has existed in this form for several decades now and has during that time sparked a great deal of debate (Shapiro 2007). Of course, its continued existence does not prove its correspondence with (legal) reality or its compatibility with a focus on popular sovereignty.

It is uncontested that there is a great amount of law besides the body of law created by the state legislature in accordance with its legislative procedure and by courts in accordance with their competences. Opinion may differ on whether some of the following items on the list are law, but hardly anyone will hold that from the list of international law, European Union law, the *lex mercatoria*, legal principles, and soft law, none are law and that, at the same time, all law satisfies the test of validity from pedigree.[8] Furthermore, the test of validity from pedigree as described above is subject to all the criticisms that Dworkin famously directed against Hart's theory developed in *The Concept of Law* (Dworkin 1968, pp. 22 f.). The example of hard cases such as *Riggs v. Palmer* shows that the claim to exclusivity, which the test of validity from pedigree makes, fails to account for the fact that legal officials such as judges consider more to be law than is law according to strict pedigree as required by the test of validity from pedigree (Dworkin 1968, pp. 22 f.).

Dworkin's criticism that the test of validity from pedigree does not accurately capture the way in which legal officials distinguish between law and nonlaw is incisive. A further point of contention is that the test of validity from pedigree assumes an institutional system of law and the implications thereof for the importance of popular sovereignty. Law is institutional in the sense that legal rules "derive their existence and status as *legal* rules from being made in accordance with rules that specify how to make legal rules" (Hage 2011, p. 6). This makes the existence and status of legal rules dependent on the operation of other legal rules, describing the institutionalization of law and creating a "legal world." How does this legal world interact with popular sovereignty? As we have seen, popular sovereignty is the power of a people acting collectively, exercised by constituting—or maintaining or deconstructing—such an institutional system of law. However, once such an institutional system is established, the critical reflective attitude of the people regarding rules or principles becomes wholly irrelevant for the classification of those rules or principles as legal or non-legal. Figure 2 below visualizes this.

While this point does not negate the claims of the test of validity from pedigree as such in the same way as Dworkin's criticism does, it shows a certain amount of inconsistency when it comes to the significance of popular sovereignty: popular sovereignty may constitute the legal system, but it cannot be determinative of individual rules of that system as these are determined solely and exclusively by their pedigree. If we acknowledge that the critical reflective attitude of the people is determinative for the existence of the entire system, but within the system, legal validity is determined solely by pedigree, the attitudes of people toward individual

[8] In line with the fact that opinions may differ on whether some of the items on the list are law, opinions may also differ on their relationship.

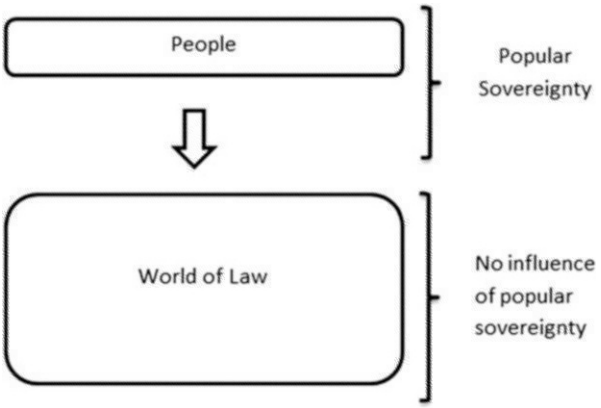

Fig. 2 Spheres of influence of popular sovereignty

rules are irrelevant. The former is consistent with a strong focus on popular sovereignty; the latter seems to deny that popular sovereignty has much significance.

In short, the test from pedigree does not capture legal reality, nor is it compatible with a strong focus on popular sovereignty. In the following section, we will consider an alternative to the test of validity from pedigree.

3.2 Validity from Reason

The test of validity from pedigree determines the validity of a rule based on its source. The test of validity from reason is an alternative in which it is not the source of the rule but rather its correspondence to the evaluative standard of rationality and reason that is decisive for legal validity. The test of validity from reason is linked not to the doctrine of legal positivism, much less hard positivism, but rather to the doctrine of natural law. Murphy (2006, p. 8) summarizes the main claim of natural law as follows: "law is backed by decisive reasons for compliance." Decisive reasons to ϕ are present when ϕ-ing is a reasonable act for one to perform and not ϕ-ing is an unreasonable act for one to perform, and "so for law to be backed by decisive reasons is for there to be decisive reasons to perform any act required by that law." This is a claim about the nature of law, in that those "laws" that are not backed by decisive reasons for compliance are not law.[9] For the purpose of this paper, this means that such "laws" as are not backed by decisive reason fail the test of validity from rationality and are therefore *not law*: they lack legal validity. Accordingly, the

[9]Murphy makes the distinction between the strong claim of natural law, whereby a 'law' that is not backed by decisive reason is not a law at all, and the weak claim of natural law, whereby a 'law' that is not backed by decisive reason is either not a law at all, or a defective law. We will here take as representative the strong claim of natural law.

test of validity from rationality is a substantive test to determine the legal validity of a rule and therewith its classification as law or nonlaw.

This separates legal validity from the social fact of acceptance of something as law. After all, those who accept a rule as being a *legal* rule may well be wrong about their judgement. As Murphy (2003, p. 248) holds, the fact that a number of rules have been recognized as law as a matter of social practice "does not make citizens and officials infallible with respect to the philosophical problem of whether these rules insufficiently grounded in reasons are really laws." In short, reason and rationality are the source of substantive standards that determine the validity of a rule; rules that do not comply with these standards are not law.[10] So the test of validity from reason is *substantive* (is this law sufficiently grounded in reason?) instead of *formal* (was this law adopted in accordance with the right procedure?). This means that principles of justice and morality can—and often are—held to be shaping the standard (Hill 1970). This leads to very different conclusions than the test of validity from pedigree:

> [. . .], a law unbacked by reason, while on the strong reading really no law at all, may well have some features of genuine law, most notably the proper pedigree. These features may cause those under it to treat it as a dictate with which they have decisive reason to comply. Indeed, a legal rule may have these features *in order to* cause people to treat it as something with which they genuinely have weighty reasons to comply (Murphy 2006, p. 14).

This conclusion from natural law and the test of validity from reason differs fundamentally from the test of validity from pedigree and the corresponding theory of exclusive legal positivism. For Ross (1999, pp. 254 f.), (one of) the reason(s) why natural lawyers and legal positivists—or adherents of a substantive and a formal test of validity—disagree about the determining factor of legal validity is that they use the term "law" in diverging ways:

> If a natural lawyer wants to reserve the term "law" for a system having some moral value, it is because he wants to emphasize terminologically the moral difference between different systems, and if a positivist prefers to classify as a legal system any factual system, whatever its moral value, that has the same structure as a typical legal system, it is because he wants to emphasize, also terminologically, the factual, structural similarity between diverse systems, whatever their moral qualifications.

Without disputing Ross's argument, there is another difference to the way in which natural lawyers and legal positivists use the term "law," which explains why their tests for legal validity differ so fundamentally: for natural law, and accordingly for the test of validity from reason to be an argument about what law *is* rather than what law *should be*, law cannot be a social construct. If it is,[11] people could construct

[10] Nota bene, however, that these standards will often include legal certainty as a substantive goal. As such, the substantive test whether a law is sufficiently grounded in reason can take into account other criteria besides the content of the law, such as concerns regarding the consequences of disobedience and the relevance of legal certainty. Cf. Finnis (2014).

[11] Alternatively: "if it were." The correct grammatical structure of that sentence fundamentally depends on one's stance on the matter it is meant to describe.

something that does not adhere to the standard to which law must—or, under this formulation, *should*—adhere, and because law *is* whatever is constructed, this would mean they are not and indeed cannot be mistaken about what is law. Popular sovereignty is an explanation of how a people as a collective entity can construct—or constitute—a legal system. As such, popular sovereignty necessarily presupposes that law is a social construct. This means that the test of validity from reason is incompatible with popular sovereignty.

In the following section, we will introduce a test of validity that does not make membership dependent on conformity with some standard, be it formal or substantive, and that coheres better with a strong focus on popular sovereignty.

3.3 Validity from Acceptance

As we have seen, neither the strict test from pedigree nor the test from reason coheres fully with a strong focus on popular sovereignty. The test of validity from reason is in fact incompatible with popular sovereignty, as defined in this paper, because popular sovereignty presupposes an understanding of law as a social construct. While the relationship between popular sovereignty and the test of validity from pedigree does not suffer from that same conflict, we have seen that the test of validity from pedigree's claim to exclusivity is not consistent with a strong focus on popular sovereignty. Let us consider an alternative that avoids these inconsistencies. In the following, we will consider a test of validity from acceptance. There are two possible understandings of the test from acceptance.

Institutional Plus Acceptance

We have already seen how an institutional system of law can have its basis in social acceptance by means of popular sovereignty. This is something the test of validity from pedigree does not deny. However, the test of validity from pedigree claims exclusivity in the sense that *only* those rules that have the right pedigree are legal rules. This means that the entirety of a legal system can be constituted by acceptance, but the attitude of a people toward individual rules of the system is wholly irrelevant for the status of those rules as law or nonlaw, that is, for their validity. The test of validity from acceptance combined with an institutional system disavows this claim to exclusivity but does not disavow the institutional system as such. This means that some rules are legal rules solely by virtue of their pedigree, and for these rules, acceptance is irrelevant. However, some rules or principles are legal not because they have the right pedigree but because they individually are accepted as legal.

Let us first consider whether this is necessary: after all, there are a number of ways in which rules that seemingly do not have the right pedigree—that is, rules that are not created in accordance with the right procedure by a body or institution with the competence to do so—can nevertheless enter the institutional system. One such

option is reference: through reference to norms, rules, or principles that do not have the relevant pedigree by rules that do have that pedigree, the existence of these norms, rules, or principles are nevertheless treated as part of the law (Hage 2017). One example of a principle that does not—or did not, at the time—have the relevant pedigree but was nevertheless treated as law is the principle of nondiscrimination on grounds of age in the *Mangold* case before the Court of Justice of the European Union (CJEU). The Court held that "[t]he principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law" (CJEU (2005) 144/04, para 75). The discriminatory provisions of the German Employment Promotion Act, which were at stake in this case, therefore violated European Union law despite the fact that Directive 2000/78 on employment equality did not yet apply for reasons of its temporal scope (Semmelmann 2013). One could argue that the principle of nondiscrimination on grounds of age is to be regarded and was correctly held by the Court to be part of Community law because Article 6 TEU refers to fundamental rights of the European Convention of Human Rights as "general principles of the Union's law." This is an argument from pedigree that may be acceptable even under the test of validity from pedigree: there is a rule with the right pedigree that refers to this principle; therefore, this principle is law.[12] Another argument is that principles such as the principle of nondiscrimination on grounds of age are treated not as extralegal but *as legal principles* by the officials who apply them, by law students who learn about them as part of the law, and by the laypeople who come in touch with these principles and are for this reason *legal* principles.

The latter is an argument not from pedigree but from attitude. What is decisive for the validity of the principle according to this argument is not the procedure according to which it was laid down but that sufficiently many sufficiently relevant people consider it to be law. With regard to the rules or principles that are broadly accepted, we can distinguish between those accepted for reasons of tradition—*custom*—and those that are accepted because they—or, rather, because their content—are seen as reasonable (Hage 2017). In this way, rationality and the content of a rule enter into the equation again, but they are not the decisive factor for validity; instead, it is the acceptance that is *due* to the rationalist content of the rule that is determinative of validity. An example of such a rule that is broadly accepted and considered a legal rule even though it cannot be identified as one by its pedigree is the rule that the leader of the party that has won a majority in the elections will be appointed as prime minister of the United Kingdom. Equally, the rules surrounding ministerial responsibility in the Netherlands are not legal rules identifiable by pedigree but are nevertheless considered in Dutch constitutional law to be rules that are legal in nature. In other legal systems, these rules are not customary as they are in the Netherlands but laid down in legal documents, such as the Basic Law in Germany

[12]This is very open-ended, however, and exclusive legal positivism would likely reject the principle(s) referenced as law and instead treat the reference as an invitation to the judge to exercise discretion and/or to employ non-legal standards in deciding the case before her.

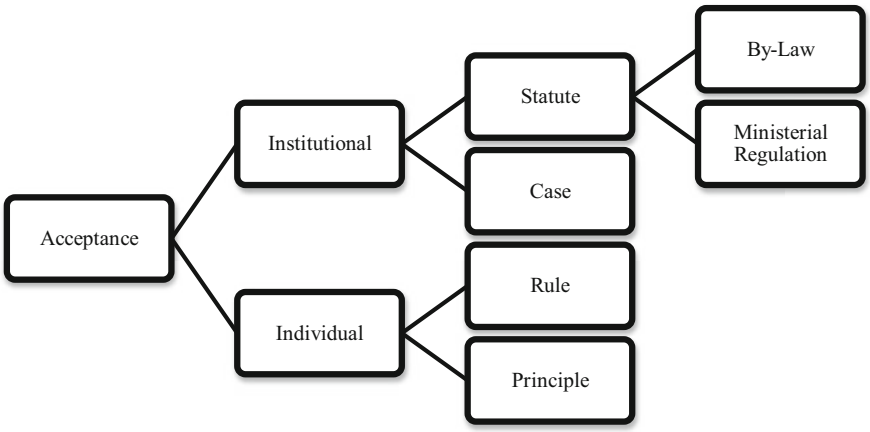

Fig. 3 Institutional and individual acceptance

(see arts. 67 and 68 of the Basic Law). Despite this distinction, the Dutch rules are no less treated as legal rules than the German ones.[13] In short, it is possible to consider that an institutional system of law based on the acceptance of the system as a whole, rather than of its individual rules, can exist side by side with rules not part of the system, which are based on individual acceptance.

Figure 3 shows the institutional system existing side by side with rules and principles whose validity is solely dependent on their individual acceptance as legal. Let us consider the alternative test of validity from acceptance before evaluating both.

Only Acceptance

The alternative test of validity from acceptance makes the validity of all individual rules dependent on their acceptance. Instead of considering that an institutional system and a collection of individual rules the validity of which is based on their acceptance exist side by side, this view disavows the institutional system of rules and the test of validity from pedigree that is determinative within that system.

[13]Prakke and Kortmann (2004, p. 603) and Kortmann (2008, pp. 301 ff.) describe the core of ministerial responsibility in the Netherlands as "an unwritten constitutional norm"; Elzinga and De Lange (2001, p. 188) discuss specifically whether ministerial accountability in the Netherlands is a matter of unwritten *law* or whether it is a constitutional convention in the sense of "constitutional morality" and as such not law, coming to the conclusion that the general consensus is as follows: customary constitutional law (*ongeschreven staatsrecht als gewoonterecht*) exists beside written constitutional law. Customary constitutional law is equal to written law, derives from its own source, may also derogate from written law, and requires custom/precedent as well as the prevalent view that it is law (*algemene rechtsovertuiging*).

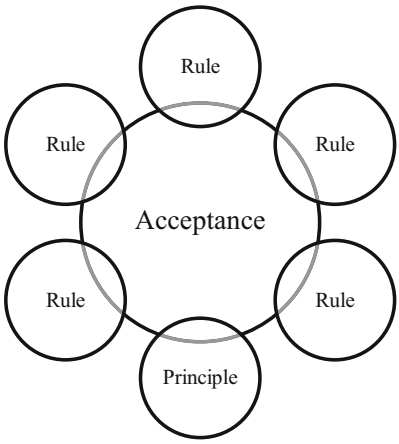

Fig. 4 Individual acceptance

This view makes the validity of each individual rule—and therefore its existence *as a legal rule*—dependent on the collective attitude of people and the efficacy of the individual rule. Figure 4 gives a visual representation of this view.

HLA Hart (2012, p. 103) seems to argue against this view when he states that

> If by "efficacy" is meant that the fact that a rule of law requires certain behaviour is obeyed more often than not, it is plain that there is no necessary connection between the validity of any particular rule and *its* efficacy, unless the rule of recognition of the system includes among its criteria, as some do, the provision (sometimes referred to as a rule of obsolescence) that no rule is to count as a rule of the system if it has long ceased to be efficacious.

While this arguably suggests an institutional system of rules, an alternative interpretation is also possible, namely that efficacy is subservient to acceptance to at least a certain degree. If by efficacy it is meant that the rule actually influences the behavior of people in their day-to-day lives, efficacy may not be a necessary condition for a rule to count as legal. This becomes particularly clear when we consider legal rules that apply only in exceptional circumstances.[14] If, however, a rule does not influence the behavior of people in their day-to-day lives and is rarely relied upon in court, the question might arise whether this rule would be accepted as a legal rule if someone were to rely on it in court after all. If the answer is yes, the test from acceptance holds that this counts as a legal rule. If the answer is no, it does not. The efficacy of the rule is then less relevant to the determination of validity than acceptance, though efficacy can of course play a large role in making people accept something as law.

This has some very concrete implications for our understanding of what counts as law and what does not. Let us consider a few examples. Firstly, what if a traffic

[14]Possible examples of laws applied only exceptionally are those laws which grant far-reaching powers to the executive in states of emergency. However, it admittedly depends on state and circumstances how exceptional their use truly is. In Germany, the Emergency Acts (*Notfallgesetze*) have not been used since their introduction in 1968 (Focus 2008).

regulation stipulates that jaywalking is prohibited but jaywalking is nevertheless a habit widely practiced? This might suggest that the rule individually is not efficacious but that as such does not yet make any statement about its legal validity. What is more relevant is whether the individuals jaywalking have an attitude of awareness that they are breaking a law and whether they would accept a penalty imposed on them by a police officer who catches them jaywalking as unfortunate but legal. Secondly, what about the 1907 rule that makes adultery a class B misdemeanor in the state of New York even today (New York State Penal Law, 255.17)? Assuming an institutional system of law, this section of the state penal law has the necessary pedigree to be considered law whether it is accepted or not. However, section 255.17 is hardly used in legal practice, and even when charges are brought, these are usually dismissed or dropped—to the point that a former federal prosecutor holds that the ban on adultery has no practical significance (Chan 2008). Furthermore, it seems that many individuals in New York do not think that adultery is a crime.[15] In the same vein, validity purely from acceptance without an institutional system beside it that grants validity on the basis of pedigree impacts the classification of soft law instruments such as the Universal Declaration of Human Rights and principles such as the Responsibility to Protect. If the test of validity is from pedigree, these have to be classified as nonlaw. If the test is from acceptance, however, the conclusion may be different depending on the attitude that people (for example, state officials) have with regard to such instruments or principles.

Evaluation

The distinction between the test of validity from acceptance in conjunction with an institutional system or without it may not seem to make much difference in practice for one simple reason: we tend to think of law as an institutional system, and this means that even though we may not know all the legal rules or may not accept (or rather: follow) all of them, we accept that they are legal rules when we are confronted with enforcement by relevant authorities. Furthermore, it is rational for us to accept all these rules for reasons of legal certainty. There is, however, one important reason why making the distinction matters, even if it seems to have, at first glance, little practical relevance: acceptance is a matter of degree rather than an all-or-nothing matter. This means that if we disavow the institutional system, or for those rules that are accepted as legal outside of an institutional system, a test of validity from acceptance means that some rules are less law than others. Under this test, law becomes a matter of degree as well.

A further point of notice is the following: while we have seen that within an institutional system of law popular sovereignty and the command theory can coexist, this is no longer the case if the institutional view of law is rejected and all validity is

[15]Of course, actual empirical studies are necessary to back this claim, which is why it is here phrased in such a qualified manner.

based on acceptance of individual rules rather than acceptance of the system. The institutional system of law is constituted by a people exercising popular sovereignty, and within that institutional system, it is still the "commands" of a constituted sovereign (such as parliament acting in accordance with a certain procedure, for example), which determine what is law. Parliament loses its constituted sovereignty when an institutional system is rejected. This does not mean that parliament acting in accordance with a certain procedure loses its significance, however, because people are likely to accept those rules created by what they accept as an authoritative body acting in accordance with the correct procedure. Nevertheless, while this variant of the test of validity from acceptance coheres with popular sovereignty, it precludes other forms of sovereignty besides itself.

4 Conclusion

The aim of this paper was to consider what implications a strong focus on popular sovereignty has for our understanding of validity. Popular sovereignty as defined in this paper requires two elements, namely efficacy and acceptance. Through their attitude, a people acting collectively can constitute, maintain, and deconstruct legal systems. This understanding was taken as focal point against which three tests of validity were evaluated for their compatibility with popular sovereignty. Validity was taken as determinative of the status of something as legal or non-legal. We have considered three different tests of validity in this paper: the test of validity from pedigree, from content, and from acceptance. With regard to the latter, we have distinguished further between a test of validity purely from acceptance and one from acceptance in conjunction with an institutionalized system in which pedigree is determinative.

The test of validity from pedigree distinguishes between law and nonlaw on the basis of a formal requirement of procedural pedigree: has the rule in question been adopted in accordance with the correct procedure by an entity with the competence to do so? This test has been criticized by Dworkin as too narrow in its approach, but we have seen that for the purpose of this paper, there is another reason to reject or at least question it: it leads to inconsistencies with regard to the role and significance of popular sovereignty. The test of validity from pedigree does not deny that popular sovereignty constitutes the legal system, but it denies that popular sovereignty can play any additional role other than that. Once the system has been constituted, the acceptance, or lack thereof, of individual rules becomes wholly irrelevant.

The test of validity from reason, by contrast, is a substantive test that makes the validity of a rule dependent on it being sufficiently grounded in reason. This test and its proponents hold that peoples or officials are not infallible in determining whether a rule is sufficiently grounded in reason—and hence also not authoritative to distinguish between law and nonlaw. What is relevant is not whether sufficiently many sufficiently important people believe that a rule is legal in nature but whether it is sufficiently grounded in reason. This test of validity must be rejected for the

purpose of this paper because it denies that law is a social construct, while popular sovereignty presupposes this. The two are therefore incompatible.

The test of validity from acceptance is, similarly to the test of validity from pedigree, formal in nature. It differs from the test of validity from pedigree, however, in that it disavows either the claim to exclusivity of that test or both the claim to exclusivity and the institutional system that the test of validity from pedigree requires. The test of validity from acceptance can be considered in conjunction with an institutional system of law within which the test of pedigree—minus the claim to exclusivity—is determinative of the status of rules as legal, with some rules being legal rules outside the institutional system, where acceptance is determinative of their status. Alternatively, validity can be dependent solely by acceptance. The test of validity from acceptance in either variant coheres best with a strong focus on popular sovereignty. While it may seem at first as though there is little practical difference between its variants, it is interesting to note that making legal validity dependent on the social fact of acceptance—be it for all rules or only for some—makes law a matter of degree.

Considering the initial aim of this paper to investigate the implications and consequences of a strong focus on popular sovereignty on our understanding of law and validity, we can now conclude as follows: a focus on popular sovereignty as it is defined in this paper precludes an understanding of validity as being determined by reason. A strong focus on popular sovereignty furthermore coheres better with a test of validity from acceptance, whether in conjunction with an institutional system or as the sole determining factor of validity, than it coheres with a strict test of validity from pedigree. Moreover, such a test of validity from pedigree does not accurately capture how people and officials see the law, while a test of validity from acceptance by definition does. As such, the conclusion is that a strong focus on popular sovereignty can and should go hand in hand with an understanding of validity as being determined by acceptance. Given that many jurisdictions explicitly refer to popular sovereignty in their constitutions, this finding has far-reaching implications for many legal systems and our theoretical understandings of them.

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